

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LARRY GIBSON**

Claimant

VS.

**BEACHNER CONSTRUCTION CO., INC.**

Respondent

AND

**ZURICH AMERICAN INSURANCE CO.**

Insurance Carrier

Docket No. **1,040,920**

**ORDER**

Claimant requested review of the December 2, 2009 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on March 3, 2010.

**APPEARANCES**

Gary L. Jordan of Ottawa, Kansas, appeared for the claimant. David Bogdan of Overland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant suffered permanent total disability. But the ALJ awarded respondent as a result of his work-related accident a credit based upon a 12.5 percent preexisting functional impairment.

Claimant requests review of whether there is substantial competent medical evidence in the record to support the ALJ's finding that claimant had a 12.5 percent preexisting functional impairment. Claimant argues there is no substantial competent

evidence of preexisting functional impairment in the record necessary to satisfy the requirements of K.S.A. 44-510e(a) and therefore the ALJ's Award should be modified to eliminate the credit for a preexisting functional impairment.

Respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is whether claimant's award should be reduced for a preexisting functional impairment.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was determined to have suffered permanent total disability as a result of his work-related accident. The sole issue raised on review is whether respondent met its burden of proof to establish a percentage of preexisting functional impairment.

K.S.A. 44-501(c) provides that any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting. In this case there is no dispute that claimant had preexisting spondylolisthesis.

The evidence established that claimant had sought treatment for back complaints in 1998 and received one epidural steroid injection. That was the only treatment for his back that he received until after the instant accidental injury. Claimant testified that he would experience episodic back pain but it did not prevent him from working. And his work history consisted of manual labor.

Dr. Alexander S. Bailey, board certified orthopedic surgeon, examined and evaluated claimant at the request of respondent's insurance carrier. The doctor reviewed medical records and took a history from claimant. On September 12, 2008, Dr. Bailey performed a physical examination and diagnosed claimant as having severe end stage degenerative changes of the lumbar spine at multilevels; spondylolysis-listhesis L5 on S1, grade I to II; and, spinal stenosis, disk bulging and arthrosis of the entire lumbar spine. X-rays were taken which revealed disk space collapse at every level, Grade I spondylolisthesis or spinal slip, L5 on S1, approaching a Grade II, severe arthrosis at every level as well as extremely severe bony overgrowth and facet abnormalities. The doctor recommended activity modification, injection therapy and that claimant learn to live with the pain. Dr. Bailey opined that any attempt at surgical correction at one level would lead to failure at others for a cascading event of multiple surgeries. The doctor further opined that

claimant had the worst appearing lumbar spine he had seen. Dr. Bailey testified that claimant's ongoing degenerative, genetic arthritic condition is preexisting.

Dr. Bailey opined:

[T]his is one of the worst lumbar spines I have ever seen in a 50 year old. He has degeneration at every level, disc bulging at every level and spondylolysis-lithesis. None of these conditions in his lumbar spine do I believe to have been caused in his January 2008 purported work injury. He may have developed some back pain, but in no way did it cause any of his symptoms or the underlying diagnoses that he has. This is exceptionally clear and I believe without question. Therefore, I do not find evidence based on his MRI scans, x-ray findings, clinical history or past history of a sustained on-the-job work injury from January 2008. I believe his condition and any need for further medical and surgical attention to be a personal medical problem and in no fashion related to a purported work injury of January 2008. This is clear and in my opinion without question.<sup>12</sup>

Dr. Bailey did not provide a rating for either claimant's current back condition or his preexisting impairment.

Dr. Joseph F. Galate, board certified in physical medicine and rehabilitation as well as pain management, examined and evaluated claimant at the request of respondent's insurance carrier. The doctor performed a physical examination on October 9, 2008, and also took claimant's medical history. Dr. Galate recommended conservative treatment such as physical therapy and facet injections under fluoroscopic guidance. The facet injections occurred on October 13, 2008, and November 17, 2008. On January 2, 2009, claimant was again seen by Dr. Galate. At that time, the doctor recommended a functional capacity evaluation which was completed on January 21, 2009. Dr. Galate opined claimant was capable of performing in the medium work category. The doctor released claimant from his care on January 23, 2009.

Based upon the AMA *Guides*<sup>3</sup>, Dr. Galate rated claimant's back at a 5 percent whole person impairment. The doctor placed permanent restrictions on claimant of no lifting greater than 25 pounds and no repetitive bending or twisting.

Dr. Galate testified:

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<sup>2</sup> Bailey Depo., Ex. 2 at 3.

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Q. And your report says that some of his degenerative changes pre-existed his injury but that he aggravated that condition in this accident; correct?

A. Correct.

Q. Okay.

A. I thought it was an exacerbation of preexisting condition, yes, sir.

Q. And the 5 percent you gave him, I take it, is for the aggravation of the injury -- of the preexisting condition?

A. Correct.<sup>4</sup>

On cross-examination Dr. Galate opined that if he had to give an overall rating for claimant's back his rating would be "up to 10 percent."<sup>5</sup>

Dr. Edward J. Prostic, a board certified in orthopedic surgery, examined and evaluated claimant on February 17, 2009, at claimant's attorney request. After reviewing claimant's medical records and taking a history from the claimant, the doctor performed a physical examination. Dr. Prostic diagnosed claimant as having grade II spondylolisthesis at L5-S1 with diffuse degenerative changes as well as nerve root entrapment. The doctor opined that claimant had destabilized his L5-S1 and most likely caused significant injury to the disk which rendered that segment unstable. The doctor noted that claimant has responded poorly to treatment and that surgery would be unlikely useful. Dr. Prostic also agreed that claimant should continue under the restrictions imposed by Dr. Galate. Those restrictions include avoidance of frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, or captive positioning.

Based on *AMA Guides*, Dr. Prostic rated claimant's functional impairment at 20 percent to the body as a whole. The doctor opined that claimant is more probably than not permanently and totally disabled from gainful employment due to his seventh grade education and his inability to read.

Q. Can you tell us, Doctor, in layman's terms what spondylolisthesis is?

A. There are a number of different types of spondylolisthesis. The kind that this gentleman has is called isthmic spondylolisthesis. This involves what are thought to be stress fractures of the pars interarticularis. These generally occur at about the

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<sup>4</sup> Galate Depo. at 25.

<sup>5</sup> *Id.* at 26.

age of 5 or 6. Three-quarters of the cases of this condition are often found by the age of 6. So most of them occur probably around that year between 5 and 6. And in children it may progress to cause great deformity of the low back and can even progress to an unhooking of the spine where the upper spine lies entirely forward of the lower spine. As it progresses, there's usually significant hamstring spasm and there may be nerve root symptoms.

In this case he had a relatively small amount of spondylolisthesis, Grade 1 or Grade 2, since childhood and in this episode he overloaded the disk and rendered L5-S1 less stable. So he may have increased his forward slippage, and according to the stress views, has dynamic instability between L5 and S1 with the spine from L5 to the skull moving forward and backward on the sacrum.<sup>6</sup>

As previously noted, K.S.A. 44-501(c) provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. That statute reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>7</sup>

And functional impairment is defined by K.S.A. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the *AMA Guides*, if the condition is addressed by those *Guides*.<sup>8</sup> The Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the *Guides* if the condition is addressed therein.

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<sup>6</sup> Prostic Depo. at 7-8.

<sup>7</sup> K.S.A. 44-501(c).

<sup>8</sup> See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001).

The Act does not require that functional impairment be actually rated before the subsequent work-related injury nor that the worker be given work restrictions for his or her preexisting condition. However, the preexisting condition must have actually constituted a ratable functional impairment. Additionally, it is the burden of respondent and its insurance carrier to prove the amount of functional impairment that existed before claimant's January 2, 2008 date of accident.<sup>9</sup>

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*<sup>10</sup>, the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L. T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L. T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. Additional factors to consider include the level of claimant's pain immediately before the recent injury, whether claimant received additional treatment and the nature of his activities in the intervening years in order to determine the preexisting impairment.<sup>11</sup> Those factors must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

The ALJ analyzed the evidence and concluded claimant had a 12.5 percent preexisting functional impairment. Interestingly, the ALJ stated:

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<sup>9</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

<sup>10</sup> *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

<sup>11</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

K.S.A. 44-501c provides that any award of benefits shall be reduced by the amount of functional impairment pre-existing the work injury. The claimant's widespread end-stage degenerative disk disease strongly suggested functional impairment before January 2, 2008. Evidence of the percentage of pre-existing functional impairment was somewhat indirect as well.<sup>12</sup>

To arrive at that percentage the ALJ averaged Dr. Prostic's 20 percent rating and Dr. Galate's 5 percent rating.

Dr. Bailey never provided a rating. Dr. Prostic rated claimant's back but did not provide a rating for his preexisting condition. In this instance, the only medical opinion that could be considered an attempt to rate claimant's preexisting functional impairment was that of Dr. Galate. Dr. Galate provided a 5 percent rating attributable to this accident and further noted claimant could have up to a 10 percent impairment if all of his back conditions were considered. That statement fails to address claimant's medical records before the accidental injury, fails to consider claimant's physical activities before the injury, and fails to identify what was being considered pursuant to the AMA Guides to arrive at that percentage. Dr. Galate's statement was speculative and insufficient to establish a preexisting functional impairment. The Board finds, pursuant to *Hanson*, that respondent has failed to prove what, if any, preexisting functional impairment claimant had and, therefore, there is no percentage of preexisting functional impairment to deduct from claimant's award.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 2, 2009, is modified to reflect claimant is entitled to an award for permanent total disability without any reduction for preexisting impairment.

The claimant is entitled to 38 weeks temporary total disability compensation at the rate of \$401.19 per week or \$15,245.22 followed by permanent total disability compensation at the rate of \$401.19 per week not to exceed \$125,000 for a permanent total general body disability.

As of March 12, 2010, there would be due and owing to the claimant 38 weeks of temporary total disability compensation at the rate of \$401.19 per week in the sum of \$15,245.22 plus 76.29 weeks of permanent total disability compensation at the rate of \$401.19 per week in the sum of \$30,606.79 for a total due and owing of \$45,852.01, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining

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<sup>12</sup> ALJ Award (Dec. 2, 2009) at 5.

balance in the amount of \$79,147.99 shall be paid at \$401.19 per week until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary L. Jordan, Attorney for Claimant  
David Bogdan, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge